



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 26, 1995

Ms. Tracy B. Calabrese  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR95-979

Dear Ms. Calabrese:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 20732.

By letter dated April 9, 1993, the City of Houston (the "city") requested an open records decision from this office concerning information relating to employee complaints of discrimination. Subsequently, this office issued Open Records Letter No. 93-329 (1993) ruling on the city's claims for exception from disclosure under sections 552.101, 552.102, 552.103(a), 552.111 and 552.117 of the Government Code. In that open records letter, however, this office indicated that the ruling only addressed the sexual and racial discrimination files and not the sexual harassment files; at that time this office was still assessing the full impact of a recent court decision on the sexual harassment files. In this ruling, we now address the sexual harassment documents and whether they are excepted under sections 552.101, 552.102, and 552.111 of the Government Code. Because we have received only representative samples, this ruling will address your claim in broad terms. The city should rely on the analysis of Open Records Letter No. 93-329 (1993) (copy enclosed) in applying sections 552.103(a) and 552.117.<sup>1</sup>

Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office concluded that section 552.111 excepts from public disclosure

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<sup>1</sup>We note that this ruling does not reexamine your claims that certain information is excepted under the informer's privilege. See Open Records Letter No. 93-329 (1993) at 2-3.

only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. [It] does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda.

Open Records Decision No. 615 (1993) at 5. Furthermore, in order for information to come within the section 552.111 exception, the information must be related to the policymaking functions of the governmental body. *Id.* "An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . ." *Id.* All of the documents you claim are excepted under section 552.111 relate to personnel problems and not to the "policymaking functions" of the commission. You may not, therefore, withhold any of the requested documents under section 552.111 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S.). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation of the South* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts:

(a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

(b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under former section 3(a)(2), V.T.C.S. art. 6252-17a, was the same as that delineated in *Industrial Foundation of the South* for former section 3(a)(1), V.T.C.S. art. 6252-17a). Accordingly, we will consider the arguments for withholding information from required public disclosure under section 552.101 and section 552.102 together.

This office had previously opined that the common-law privacy aspects of sections 552.101 and 552.102 did not apply to witness names and statements regarding allegations of sexual misconduct. Open Records Decision No. 579 (1990). However, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), has held that "names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages and other highly personal material" are protected from disclosure under the privacy exceptions as described by the *Industrial Foundation of the South* court, 840 S.W.2d at 524-25. The court, however, ordered the affidavit of the person under investigation and the conclusions of the board of inquiry released to satisfy the legitimate public interest. *Id.* We believe that *Ellen* is controlling on the documents at issue in your request. To satisfy the public's interest, the city must release the standardized grievance forms and the respondents' statements with identifying information of complainants and witnesses redacted.<sup>2</sup> All witness statements, however, must be withheld in their entirety. For your convenience, we have marked with red brackets the types of information contained in the documents that must be redacted. General information about disciplinary action taken against employees must be released. Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under section 552.102); 470 (1987) (public employee's job performance does not generally constitute *private* affairs); 444 (1986) (public has a legitimate interest in knowing the reasons for the dismissal, demotion, promotion, or resignation of a public employee);

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<sup>2</sup>Although the *Ellen* court implies that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think that in most cases the public's interest in disclosure greatly outweighs the accused's privacy interest. See 840 S.W.2d at 525; see also Open Records Letter No. 93-329 (1993) at 3 (discussion of false-light privacy).

438 (1986) (public clearly has a legitimate interest in knowing the details of an apparently well-founded accusation against a city supervisor); 336 (1982) (names of employees taking sick leave and dates thereof are not excepted by section 552.102).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/LBC/rho

Ref.: ID# 20732

Enclosures: Open Records Letter No. 93-329 (1993)  
Marked documents

cc: Mr. Jay D. Root  
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(w/o enclosures)